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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

E. L. FISHER and ANNA MARGARET FISHER,
husband and wife,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, and CHARLES L. MILLER,
West Virginia Commissioner of Highways,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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ISSUES PRESENTED FOR REVIEW

1. The petitioners were deprived of real property more than 12 years ago; and the ruling of the West Virginia Supreme Court of Appeals, made under color of West Virginia Code 56-6-12, denied petitioners the rights of due process and equal protection of the laws and receipt of just compensation for their property as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 3 of the Constitution of the State of West Virginia.

2. The West Virginia Supreme Court has fashioned a standard of jury qualifications which ignores and invalidates the universally recognized principle that there must be evidence of bias or prejudice as to a venireman challenged before he may be struck for cause.

3. The West Virginia Supreme Court has fashioned in the instant case the

most restrictive standard of jury qualification to be found in the United States; and as a result petitioners will be forever denied just compensation for their real property taken for public use by respondents more than 12 years ago, as quaranteed them by our Constitution.

PARTIES TO THE PROCEEDING

Petitioners

E. L. Fisher and Anna Margaret Fisher,
husband and wife

Respondents

West Virginia Department of Highways,
a corporation, and Charles L. Miller,
West Virginia Commissioner of Highways

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WEST VIRGINIA SUPREME COURT OF APPEALS

STATEMENT OF JURISDICTION

On March 22, 1982, the Supreme Court of Appeals of West Virginia ordered that the verdict of the jury of the Circuit Court of Braxton County

rendered September 1980, awarding unto petitioners the sum of Eight Hundred Forty-one Thousand Nine Hundred Dollars ($841,900.00) as just compensation for property taken by respondent on 29th day of April, 1970, by the right of eminent domain and the order entered thereon by the Circuit Court of Braxton County, West Virginia be reversed and remanded for new trial. (1a-29a.)[1]

A timely petition for rehearing, filed with the Supreme Court of Appeals of West Virginia, was denied on May 27, 1982. (1b-2b.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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[1]The reference to "R" followed by a number is to the record of the trial court, followed by the page number. References to the appendices are indicated by a number followed by a small letter. A copy of the portion of the trial court record pertinent to jury selection will be lodged with the Clerk of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes which are involved in this case are set forth in Appendix C, infra:

U.S. Const., Amend. V
U.S. Const., Amend. XIV, §1
W. Va. Const., Art. III, §9
W. Va. Code § 54-1-1
W. Va. Code § 54-2-1
W. Va. Code § 54-2-10
W. Va. Code § 56-6-12

STATEMENT OF THE CASE

The petitioners are both life-long residents of Braxton County, West Virginia, and are in their seventies. The petitioner, E. L. Fisher, M.D., is a physician actively practicing medicine in Braxton County and has been engaged in his medical practice and community activities for almost 50 years. Braxton is an agricultural county, with a population of approximately 14,000 residents.

The petitioners are the owners of a tract of land containing in excess of 500 acres, situate in Braxton County, West Virginia, operated as a cattle farm. By order of the Circuit Court of Braxton County, dated April 29, 1970, the West Virginia Department of Highways acquired by the right of eminent domain, rights-of-way and permanent easements over, across and through 79.06 acres of petitioners' land, and a temporary easement over an additional 1.13 acres for construction of Interstate 79. Prior to this taking, petitioners' land fronted along U.S. Route 19 and W. Va. Route 4 (formerly the major north-south route of travel through West Virginia) for more than a mile. It is along this portion of petitioners' property that the limited access interstate highway is constructed.

On April 29, 1970, when it was given the right of access to petitioners' property, the West Virginia Department of Highways deposited with the Circuit Court of Braxton County,

West Virginia the sum of Thirty-eight Thousand Five Hundred Dollars ($38,500.00) as just compensation for the property and easements. On August 19, 1970, a Commissioner's hearing was held and petitioners were awarded Eighty-nine Thousand Dollars ($89,000.00) for the rights of way and easements taken. Exceptions to the Commissioner's award were filed by both these petitioners and the West Virginia Department of Highways. Ten years later a jury of 12 freeholders found Eight Hundred Forty-one Thousand Nine Hundred Dollars ($841,900.00) to be just compensation for the property and easements taken.

On August 4, 1980, a jury was selected "* * * free from exception * * *" by either counsel for the Department of Highways or these petitioners. (R. 6.) After being sworn by the trial court, the jury was dismissed and directed to return to the courtroom on September 10, 1980, for the taking of evidence and trial.

On September 10, 1980, before the taking of any evidence, a mistrial was declared, the jury was dismissed, and the court clerk was directed by the trial court to summons a new jury venire on September 11, 1980, for the purpose of selecting a jury.

On Thursday, September 11, 1980, the clerk of the circuit court called a panel of 20 jurors. It is important to note that 16 of the jurors chosen for the August 4, 1980, panel from which a jury was selected and found by counsel for the petitioners and counsel for the Department of Highways to be "* * * free from exception * * **" (R. 6) were also chosen as prospective jurors on September 11, 1980.[2] Upon voir dire by the court, it was determined that a number of the prospective jurors were acquainted with the petitioners and/or one or more of the value witnesses the

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[2]Copies of the jury lists obtained from the trial court file are lodged with the Clerk of this Court.

counsel for petitioners advised the court would be called. Each of the prospective jurors answered without hesitation that his/her acquaintance with the petitioners and/or petitioners' witness would not cause him/her bias or prejudice, and he/she would be able to base a decision solely on the evidence, instructions of the court, argument of counsel and consultation with fellow jurors (R. 19-54). Upon completion of the trial court's voir dire, counsel for the Department of Highways moved "* * * that the entire jury venire be challenged for cause and dismissed * * *" (R. 57). The trial court denied the motion of counsel for the Department of Highways, ruling "* * * there is not showing that the jury would be prejudice * * *" (R. 61). The trial court further advised Department of Highways' counsel that he would be afforded an opportunity to establish cause for strikes or dismissal of some or all of the jurors from the panel on further voir dire (R. 61). Upon motion of counsel for petitioners, individual voir dire of

each of the prospective jurors was held in chambers. During the individual voir dire, each of the veniremen interviewed by counsel for the petitioners and respondents answered without hesitation that he/she could act fairly and receive the evidence and make a decision based upon the evidence and instructions of the trial court (R. 66-152).

Upon conclusion of the individual voir dire, counsel for the Highways Department first advised the trial court that he had "* * * nothing at this time." (R. 152.) Then, almost as an afterthought, Department of Highways counsel said "For the record, let me make my former motion." (R. 152.) The trial court then overruled this "* * * former motion" and the jury was struck and evidence was presented.

At the conclusion of all of the evidence presented by petitioners and the Department of Highways, a view of the lands of petitioners, argument of counsel and instructions of the trial

court, the jury found the sum of Eight Hundred Forty-one Thousand Nine Hundred Dollars ($841,900.00) to be just compensation due the petitioners for the land acquired by the Highways Department.

The Highways Department made objection and exception to the verdict and filed a petition for writ of error and supersedeas with the West Virginia Supreme Court of Appeals.

On March 22, 1982, the West Virginia Supreme Court of Appeals reversed the judgment of the Circuit Court of Braxton County and remanded this matter for new trial on the grounds that "* * * a likelihood of bias or prejudice on the part of the jury existed sufficient to require that the verdict of the jury be set aside and a new trial awarded." (28a.) The West Virginia Supreme Court further found "* * * no reversible error * * * with respect to the instructions challenged by the appellant in this appeal, and all

other errors asserted by the appellant are without merit." (29a.)

The petitioners herein filed a timely petition for rehearing on April 20, 1982, in which the federal questions presented now for review were raised. The West Virginia Supreme Court, on May 27, 1982, ignored and failed to address these issues, and denied petitioners' rehearing petition without comment. (30a.)

ARGUMENT AND REASONS FOR ALLOWING WRIT

The West Virginia Supreme Court of Appeals ignored the great care taken by the trial court to empanel a jury free from bias or prejudice. It is undisputed that 13 of the 20 prospective jurors were "acquainted" with the petitioners E. L. Fisher and/or Anna Margaret Fisher. A juror, however, is not disqualified from sitting in a matter because he is an "acquaintance" of one of the litigants. West Virginia Code § 56-6-12 establishes the method to

be followed in an instance such as this; and allows either party to examine

> "* * * on oath any person who is called as a juror * * * to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice * * *." (6c.)

The trial court acknowledged this provision of the West Virginia Code when it overruled the Department of Highways' motion that "* * * the entire jury venire be challenged for cause and dismissed * * *" (R. 57) and proceeded on individual voir dire. The conduct of such an individual voir dire of the entire jury and not just those expressing an acquaintance with the appellees and/or their appraisal witnesses was welcomed by counsel for the Department of Highways, who declared that "* * * it would help to get a free and impartial jury." (R. 61.)

No restrictions were placed upon counsel for the Department of Highways; and each of the prospective jurors was queried not only with regard to possible bias or prejudice for petitioners, but also as to any feeling they had with regard to the eminent domain rights of the Highways Department.

This type of comprehensive, recorded jury voir dire has been declared a reliable method of determining whether a fair and impartial jury can be empaneled "* * * pursuant to procedures, practices and principles developed by the common law since the reign of Henry II." United States v. Haldeman, 559 F.2d 31, 64 n. 46 (C.A., D.C. 1976) cert. denied.

When queried, the jurors spoke candidly of any "acquaintance" or relationship they might have with either of the petitioners and/or their witnesses. As an example of the candor and good faith exhibited by the jury venire during individual voir dire and

the broad interpretation placed on them of the term "personal acquaintance," petitioners would point out to this Court statements made by prospective juror eight. She referred to a "personal acquaintance" with Russell Stobbs, one of the attorneys for the State. Upon voir dire, it was revealed that this "personal acquaintance" resulted from her interview by Mr. Stobbs (one of the trial counsel for the Highways Department) as a possible witness in a matter which had subsequently been dismissed (R. 103).

It is readily acknowledged that the Department of Highways, as well as the petitioners, was entitled to a trial by a panel of indifferent and impartial jurors. The "common sense" standard of jury qualification as espoused by our courts and found in Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961), recognizes, however, that to be indifferent and impartial "[i]t is not required * * * that the jurors be totally ignorant of the facts and issues

involved." Applying this "common sense" standard to the instant case, it was not necessary that to be impartial the prospective jurors be hermits or totally unfamiliar with the petitioners and/or appraisal witnesses. This is true especially in light of the fact that Braxton County has a total population of approximately 14,000 where the petitioner, E. L. Fisher, M.D., was born and has practiced medicine for more than 40 years; and the appraisal witness Hefner is a native and has been an employee at one of the county's two banks for more than 20 years; and the appraisal witness Kyer is a native and has been engaged in the insurance business for more than 20 years.

Most law with regard to the striking of a juror for cause is found in criminal trial appeals. A 1974 appeal to the West Virginia Supreme Court of Appeals contains an assignment of error analogous to the assignment of error that Court asserted was reason to reverse and remand this case for new

trial. The West Virginia Supreme Court of Appeals in State v. Charlot, ___ W. Va. ___, 206 S.E.2d 908 (1974), held that a defendant was not entitled to have an entire jury venire struck for cause, although 13 of the 20 had served in trials of cases involving similar subject matter and identical witnesses. The West Virginia Court in Charlot, acknowledged the well-established principles of law regarding the issue of bias and prejudice in jury qualification, and held that:

> "The true test to be applied with regard to the qualification of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the courts' instructions."

Defendants prosecuted in one of the most widely publicized and followed events in our nation's recent past--the alleged cover-up in the "Watergate" affair--asserted on appeal that they were denied a fair trial because the jury was not sufficiently impartial.

The District Appeals Court, in response to this assignment of error, found that:

> "* * * a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim 'not as a matter of speculation but as a demonstrable reality.' United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 970, 100 L. Ed. 1339 (1956), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268 (1942). This demonstration can be made only by reference to the voir dire * * *." United States v. Haldeman, 559 F.2d 31, 60 (C.A., D.C. 1976), cert. denied, 97 S. Ct. 2641. (Emphasis added.)

The Department of Highways had a burden in the instant case to prove that it was denied a fair trial because the jury was not impartial or sufficiently indifferent. No indication of bias or prejudice can even remotely be inferred from a review of either the voir dire conducted in open court by the trial

judge or the individual voir dire conducted out of the presence of the other veniremen. From the actions of counsel for the Department of Highways it is evident he realized no bias or prejudice was shown upon the part of the jury venire which would establish grounds for the striking of one or all of them for cause. First, counsel for the Department of Highways made no motion to strike for cause any individual juror upon the conclusion of his/her voir dire or upon the conclusion of all of the voir dire. He did not even explore the possiblity of bias or prejudice with several of the jurors who indicated an acquaintance with appraisal witnesses. (R. 132, 137, 150.) Secondly, counsel for the Department of Highways, as an afterthought, made only a pro forma motion to strike the entire jury panel for cause upon conclusion of the individual voir dire, as follows:

"The Court: Is there anything further, any motions or anything?

"Mr. Hunt: I have nothing at this time.

"The Court: How long do you anticipate you will need to consider your strikes?

"Mr. Hunt: For the record let me make my former motion.

"The Court: Go ahead.

"Mr. Hunt: And I would anticipate the same ruling.

"The Court: Okay, the record will show that the State renewed its motion to dismiss this panel and change the venue and the Court, upon due deliberation and consideration was of the opinion to and did overrule the motion."

This exchange, having occured after a meaningful and unrestricted individual voir dire of the entire jury venire, without question substantiates the

contention of the petitioners that no bias or prejudice was exhibited by the venire. The trial court, having observed the demeanor and actions of each prospective juror upon voir dire, most assuredly did not abuse its discretion in denying the motion to dismiss the entire jury venire. In no other jurisdiction can such an extreme and conservative test be found for juror qualification as the one fashioned by the West Virginia Supreme Court of Appeals in the instant proceeding. It ignored the well-established, common sense standard of jury qualification begun with the reign of Henry II, almost a thousand years ago.

The West Virginia Supreme Court of Appeals found no fault with the evidence presented to the jury or instructions of the trial court. Its opinion further makes no sound finding or showing that the testimony of any prospective juror was indicative of bias or prejudice. It abrogated the heretofore universal standard of jury qualification; and

fashioned for this specific case a rule that "* * * although all prospective jurors stated that they could return a verdict free from bias or prejudice * * * a likelihood of bias or prejudice existed * * *." (28a.) Further indicative of the fashioning of this rule of law to fit the instant case is the qualification by the West Virginia Supreme Court of Appeals that this likelihood exists "[i]n an eminent domain proceeding * * *." (28a.)

Braxton is a rural, sparsely populated county. This factor, coupled with the professions of the petitioner, E. L. Fisher, M.D., and the appraisal witnesses makes it impossible to empanel a jury for trial of this matter under the standard now imposed by the West Virginia Supreme Court. This fact was acknowledged by counsel for the Department of Highways at the time of his motion to strike the entire jury venire, when he stated:

"* * * a future jury that would be empaneled in this county, with the longstanding reputation of Dr. Fisher as a practicing physician in this county, * * * would not be of any better situation, and there would probably be the same knowledge."

West Virginia Code § 54-2-1 places jurisdiction for eminent domain proceedings in "* * * the county in which the estate is situated * * *." Our Code further provides that when either party properly demands it "* * * the question of just compensation and any damages to be paid, (shall) be ascertained by a jury, in which case a jury of twelve freeholders shall be selected and empaneled * * *." West Virginia Code § 54-2-10.

The Fifth Amendment to the United States Constitution decrees that private property shall not be taken for public use without payment of just compensation.

The West Virginia Constitution, Article III, Section 9, goes one step further in providing that "* * * when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

The Fourteenth Amendment to the United States Constitution dictates in Section 1 that no State shall "* * * make or enforce any law which shall abridge the privileges * * * of citizens of the United States * * * nor * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The ruling of the West Virginia Supreme Court in the instant case, at first glance appears but a slight deviation from prior procedure; but it is a deviation which will deprive the petitioners of their guarantees to just compensation and equal protection of the laws. While the West Virginia Supreme

Court most surely limited the application of its new standard to the instant factual situation,

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * *." Boyd v. United States, 116 U.S. 616, 635 (1885), quoted in Monongahela Navigation Co. v. United States, 148 U.S. 312, 37 L. Ed. 463, 467, 13 S. Ct. 622 (1892).

The petitioners have been denied protection guaranteed under the United States Constitution and the West Virginia Constitution against unlawful government encroachment upon their inalienable rights. Though the right to condemn private land for public use is constitutionally provided for, it is a well-settled principle of universal law that the right to just compensation is an incident to the exercise of that power. The one is so inseparably connected with the other that they are

said to exist, not as separate and distinct principles, but as parts of one and the same principle. Monongahela Navigation Company v. United States, 148 U.S. 312, 37 L. Ed. 463, 13 S. Ct. 622 (1892), (hereafter Monongahela). Petitioners herein were deprived of their property more than 12 years ago and have not yet received just compensation therefor. The requirement that just compensation be made to the landowner is a limitation set out in the United States Constitution, Fifth Amendment, and the West Virginia Constitution, Article 3, Section 9, as a protective mechanism to assure that government cannot trespass upon the inalienable rights of persons and property which, by the Declaration of Independence, are vested in citizens of the United States. Monongahela. This requirement of just compensation does not prevent the government from taking land for the public good, but it should prevent government and the public from burdening one individual beyond his fair share. Petitioners strongly assert that 12 years is an unreasonable period

to delay payment and is a burden so great that it amounts to disregard of the requirement that just compensation be made. Petitioners' burden is not limited to the past 12 years of deprivation without compensation. The extent of the injury to the petitioners is not yet ascertained due to the West Virginia Supreme Court of Appeals' decision, which amounts to a continuing disregard of constitutional mandates and effectively continues the delay of compensation to petitioners indefinitely and most likely permanently.

The West Virginia Supreme Court of Appeals' ruling denies petitioners their specific rights to due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. The West Virginia Supreme Court made their decision under color of West Virginia Code § 56-6-12, which sets out the general standards of qualification of jurors relating to interest or bias toward the action at hand. Though the law is specific that

one who claims to have been denied a fair trial because the jury was interested or bias must carry the burden of that assertion. United States ex rel. Darcy v. Handy, supra. The West Virginia Supreme Court based their ruling of reversal of the jury verdict upon "* * * a likelihood of bias or prejudice on the part of the jury * * *." (28a.) The West Virginia Supreme Court's blatant disregard of a settled rule of law denies the petitioners due process. The due process clause not only requires just compensation for land taken, but also acts to protect the landowner from the adoption of any form of procedure in eminent domain cases which deprives the landowner of a reasonable opportunity to be heard and to present such objections and claims as he is under law entitled to make. Slattery Company v. United States, (C.A. 5 La.) 231 F.2d 37 (1956). The West Virginia Supreme Court has fashioned a rule which prevents the petitioners from attaining a jury verdict on the amount of just compensation due. The Court referred

repeatedly to the fact that some of the prospective jurors knew the petitioners and/or the potential witnesses for appraisal of petitioners' land, apparently ignoring the facts pointed out by petitioners in their brief that Braxton County is a sparsely populated rural area where the petitioner, E. L. Fisher, M.D., was born and practiced medicine for more than 40 years. Since West Virginia Code § 54-2-1 specifically provides that trials for eminent domain proceedings to be held in the circuit court in the county where the land was taken, the standard of the West Virginia Supreme Court is an impossible one for petitioners and other well-known persons in a rural community to bear. This effectively denies petitioners their right to a jury trial under West Virginia Code § 54-2-1, as well as their right to not be deprived of their property without due process of law. The rationale of West Virginia Code § 54-2-1, which requires that eminent domain cases be tried in the circuit court where the property lies is based upon the common

sense that persons in and around the community who will be called to jury duty will be familiar with the land and the properties testified to as comparable; and, thus better able to assess its true value. It is highly unlikely that the Legislature contemplated that such a jury would be familiar with the land and yet be totally without knowledge or acquaintance of the landowner. Not only does the West Virginia Supreme Court's decision in effect disregard the mandate of West Virginia Code § 54-2-1, it further acts to deprive petitioners of the fundamental safeguards which the law has set up through this statute. In Slattery Company v. United States, supra, the court held that the commission which was to decide the amount of just compensation denied the appellant therein due process of law by determining the amount of damage due by an unguided, unregulated and arbitrary opinion; rather than determining just compensation under the settled rule of law. In the instant case, the West Virginia Supreme Court has promulgated

a new standard of jury qualification; to-wit: rather than following the well-settled rule of law that any bias or interest must be shown, the court decided to speculate that there was a likelihood and base its decision upon that speculation. The Slattery case is replete with warnings that, in this period of great governmental expansion of streamlining procedures for ease of eminent domain powers, there is an alarming attitude of complacency at the extent of power the government has by which all that a man has can be taken from him by force. Therefore, petitioners urge this Court to closely adhere to the principles of the due process clause which, in addition to its requirement of just compensation, also "protects the landowner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make." State ex rel. City of St. Louis v. Beck, 333 Mo. 1118, 63 S.W.2d 814, 92 A.L.R. 373

(1933). The small population of the county where the land is situated, coupled with the prominence of a doctor who has lived and practiced medicine in the community for over 40 years, makes it impossible for a jury to be empaneled with persons from the county who would not know petitioners and/or any of their witnesses. The petitioners' situation and the West Virginia Supreme Court's ruling combine to cause a denial of equal protection under the law without any rational basis or necessary State interest. The West Virginia Supreme Court's decision is a facade decrying fairness when, in actuality, it operates as a protective mechanism to keep the State coffers full, and the landowners in court. The decision was fashioned to fit the instant case and serve the State while trampling the rights of the individual petitioners.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the Supreme Court of Appeals of West Virginia reviewed and the injustice and denial of petitioners' constitutional rights created thereby corrected.

Respectfully submitted,

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